TC02905

Appeal number: TC/2012/08434

Income tax – partial surrenders of life policy – effect of chargeable events provisions in Chapter 9, Part 4 ITTOIA 2005 – partial surrenders carried out inadvertently in a way which generated unnecessary tax liability – Tribunal has no power to correct the mistakes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROGER DOWNWARD **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: **JUDGE KEVIN POOLE**
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Sitting in public in Priory Court, Bull Street, Birmingham on 22 March and 3 July 2013

Delwyn Davies of Holland Morgan Limited, Independent Financial Advisers for the Appellant

Susanne Whitley Bennion, Presenting Officer for the Respondents

Summary decision issued on 16 July 2013. This full decision is issued following a letter of appeal from the Appellant's representative in response to that summary decision, which was treated by the Tribunal as an application for full findings and reasons for the Tribunal's decision, as a first step in a potential application for permission to appeal.

DECISION

Introduction

1. This is an appeal against an assessment raised by HMRC to recover income tax supposedly due under the "chargeable events" legislation contained in Chapter 9, Part 4 Income Tax (Trading and Other Income) Act 2005 (sections 461 to 546) in respect of two partial surrenders of a life insurance policy made during the 2007-08 tax year.

2. In brief, the Appellant does not dispute that the charge is correctly imposed in line with the legislation, but he claims that it was only because of mistakes in the partial surrender instructions that the partial surrenders were effected in a way which generated the tax charge. He seeks retrospectively to correct those mistakes, with a view to restructuring the partial surrenders in a way which, whilst having exactly the same financial effect, would not trigger the tax charge under appeal.

The facts

3. On 28 March 2007 the Appellant invested £120,000 in a Sterling Investment Bond ("the Bond"), issued by Zurich Assurance Limited ("Zurich").

4. The terms of the Bond provided that it was divided into 1,000 separate insurance policies. It permitted partial encashments, and the terms and conditions stated that:

> "86 If you take a partial encashment, we will cancel units to the value of the partial encashment from all the Policies in your Investment Bond, proportionately from each fund.
>
> 87. Or, you may decide to cash in whole Policies to make up the amount you wish to take. If you make this request, whole Policies will be cashed in, and any balancing amount will be taken by cashing in units in the manner described in 86."

5. Each of the 1,000 policies within the Bond was a policy of life insurance falling within section 473 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") and accordingly fell within the charging provisions of Chapter 9 of Part 4 ITTOIA.

6. Shortly after making his investment, the Appellant wished to withdraw some of it for private purposes and asked Mr Davies, his financial adviser, to arrange it. A "Request for Full or Partial Surrender" form produced by Zurich was filled out by Mr Davies. He arranged for the Appellant to sign it on 19 December 2007 and then he submitted it to Zurich on 22 December 2007. It requested a partial repayment of £60,000 and the method of surrender that Mr Davies requested was "Method B – partially surrender £60,000 by surrendering equally from all the individual contracts within the investment bond. Units to be surrendered proportionately across each investment fund." Mr Davies had ticked the box to request this method, and we

accept his evidence that it was a simple error on his part, whether or not he was actually aware at the time of the consequences of selecting that method.

7. On or about 24 December 2007, Zurich sent the £60,000 requested to the Appellant. Because he had apparently requested that it be sent by direct bank transfer, an extra fee of £35 was charged and added to the amount of the partial encashment

8. Very shortly afterwards, the Appellant wished to withdraw a further £20,000 for private purposes. He contacted Mr Davies and, as a result of a telephone call with him, he submitted a simple letter to Zurich on 7 February 2008, requesting as follows:

> "Please en-cash units to the value of £20,000 Net and forward cheque to my address..."

9. In response to this letter, Zurich sent the further requested cheque very shortly afterwards.

10. The Appellant made no mention of either of these partial surrenders on his tax return for the year 2007-08.

11. He heard nothing further on the matter until he received a letter dated 2 September 2011 from HMRC. They informed him they had received a "Chargeable Event Certificate" from Zurich which showed that he had received a taxable gain arising on chargeable events during the "policy year" ended 27 March 2008. The amount of the taxable gain was £74,035 (being the £80,035 actually paid out less the £6,000 tax-free amount available for the year at the rate of 5% of the original investment). It also confirmed that a £14,807 tax credit at the rate of 20% had accrued to him to set against his tax liability (i.e. £74,035 x 20% = £14,807).

12. These facts were confirmed and HMRC raised an assessment dated 22 March 2012 for £7,886.20. This was effectively the higher rate tax due at 40% (less the tax credit at 20%) on what was now established to be the amount of the Appellant's total income subject to higher rate tax for the year (£39,431).

13. The Appellant now appeals against this assessment.

The legislation

14. There was no dispute about the effect of the tax legislation applying to partial surrenders of life policies. We therefore do not set out that legislation in full in this decision. Suffice it to say that Mr Davies accepted that the calculation was properly performed and in accordance with the legislation on the basis of a partial surrender of each policy within the Appellant's Bond.

Submissions

15. Mr Davies argued that the instruction to deal with the first encashment by way of a partial surrender of each policy within the Bond was a simple error on his part. Such an error should, he submitted, be capable of correction by the Tribunal.

16. So far as the second partial encashment was concerned, he accepted that there was no instruction given as to the method to be applied. It was clear on the face of the terms and conditions of the Bond that in the absence of any instruction to the contrary, a partial encashment would be dealt with as a partial surrender of each policy within it. He could not therefore contest the basis of the second encashment, except to say that it was clearly done in the wrong way, would certainly not have been done in that way if the implications had been known and again the inherent mistake should be capable of being corrected.

17. Mrs Bennion submitted that it was clear from the documents how the partial encashments had actually taken place and that was conclusive. History could not be changed, and unfortunately the Appellant was bound by the terms and conditions of the Bond and the actual basis upon which the partial encashments took place.

Discussion

18. In relation to the first encashment, the instructions given were quite clear and were acted on by Zurich. In relation to the second encashment it is clear that, in accordance with the terms of the Bond, Zurich acted correctly in dealing with it by way of a partial surrender of each policy within the Bond.

19. The question of possible rectification has been considered by the First-tier Tribunal (Judge Hellier) in *Joost Lobler v HMRC* [2013] TC02539. We can only echo and respectfully agree with the analysis in that decision. This Tribunal has no power to set aside and reconstitute a transaction that has occurred on some basis different from that on which it did occur simply because one of the parties to the transaction has realised that he made a mistake which he now seeks to correct. On the basis of the events that actually took place, unfortunately the Appellant has no answer to the assessment and the appeal must be dismissed.

20. We echo the comments of Judge Hellier as to the repugnance of this result but, like him, find that we are unable to reach any other conclusion.

21. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2013